

Filed

AUG 28 2014

**RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE**

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

DAVID HUNTER,

Plaintiff,

v.

MARK, et al.,

Defendants.

Case No. C 14-1446 PSG (PR)

**ORDER DENYING MOTION
FOR LEAVE TO PROCEED IN
FORMA PAUPERIS; ORDER OF
DISMISSAL**

David Hunter, a pretrial detainee proceeding *pro se*, brought this civil rights action pursuant to 42 U.S.C. § 1983. Hunter also has filed a motion for leave to proceed in forma pauperis ("IFP"). On July 31, 2014, the court issued an order to show cause why Hunter's motion for IFP should not be denied. The court also dismissed the complaint with leave to amend. Plaintiff has filed an amended complaint as well as another motion to proceed IFP. For the reasons stated below, the court denies Hunter's motion for leave to proceed IFP, and dismisses this action.

I. DISCUSSION

The Prison Litigation Reform Act of 1995 ("PLRA"), enacted April 26, 1996, provides that a prisoner may not bring a civil action or appeal a civil judgment under 28 U.S.C. § 1915 "if

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1 the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility,
 2 brought an action or appeal in a court of the United States that was dismissed on the grounds that
 3 it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the
 4 prisoner is under imminent danger of serious physical injury.”¹ The phrase “fails to state a claim
 5 on which relief may be granted,” as used in Section 1915(g), “parallels the language of Federal
 6 Rule of Civil Procedure (“Rule”) 12(b)(6).”² A case is “frivolous” within the meaning of Section
 7 1915(g) if “it is of little weight or importance: having no basis in law or fact.”³ Further, because
 8 Section 1915(g) is a procedural rule that does not raise retroactivity concerns, cases dismissed
 9 before the effective date of Section 1915(g) may be counted as qualifying dismissals or
 10 “strikes.”⁴

11 The plain language of the imminent danger clause in Section 1915(g) indicates that
 12 “imminent danger” is to be assessed at the time of filing, not at the time of the alleged
 13 constitutional violations.⁵ Hunter has the burden of proving that he is in imminent danger of
 14 serious physical injury.

15 A review of the dismissal orders in Hunter’s prior prisoner actions reveals that he has had
 16 at least three such cases dismissed on the ground that they were frivolous, malicious, or failed to
 17 state a claim upon which relief may be granted. Hunter was given notice that the court believed
 18 the following federal district court dismissals may be counted as dismissals for purposes of
 19 Section 1915(g): (1) *Hunter v. Marshall*, N.D. Cal. Case No. C 95-982 MHP (civil rights action
 20 dismissed as factually and legally frivolous), (2) *Hunter v. First Appellate District*, N.D. Cal.
 21 Case No. C 95-4258 MHP (pleading filed on § 2255 motion form construed as a civil rights

22 ¹ 28 U.S.C. § 1915(g).

23 ² *Andrews v. King*, 398 F.3d 1113, 1121 (9th Cir. 2005) (“*Andrews I*”).

24 ³ *Id.* (internal quotation and citation omitted).

25 ⁴ *See Tierney v. Kupers*, 128 F.3d 1310, 1311-12 (9th Cir. 1997).

26 ⁵ *See Abdul-Akbar v. McKelvie*, 239 F.3d 307, 312 (3d Cir. 2001) (en banc).

1 action and dismissed as frivolous); and (3) *Hunter v. Mandeville*, N.D. Cal. Case No. C 95-2443
 2 MHP (civil rights action dismissed for failure to state a claim). The court made its evaluation of
 3 the first two cases based on the dismissal orders and the third case based on the docket sheet.⁶

4 Hunter has not offered any argument or dispute that any of these three cases should not
 5 count as a strike. A review of these cases demonstrate that they all qualify as “strikes” pursuant
 6 to Section 1915(g). First, cases that are dismissed for failure to state a claim clearly count as
 7 strikes.⁷ Second, the dismissal of a habeas petition that was actually a challenge to prison
 8 conditions also counts as a strike pursuant to Section 1915(g).⁸ The three above-referenced cases
 9 therefore count as dismissals for purposes of Section 1915(g).

10 In addition, the allegations in Hunter’s initial pleading do not demonstrate that he is
 11 under “imminent danger of serious physical injury” within the meaning of Section 1915(g). The
 12 availability of this exception turns on the “conditions a prisoner faced at the time the complaint
 13 was filed, not at some earlier or later time.”⁹ As this is merely a “threshold procedural” question,
 14 the Ninth Circuit has indicated that district courts should not conduct an overly detailed inquiry
 15 into whether a particular danger is serious enough under the serious physical injury prong.¹⁰
 16 Rather, “the exception applies if the complaint makes a plausible allegation that the prisoner
 17 faced ‘imminent danger of serious physical injury’ at the time of filing.”¹¹ In order to satisfy the
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20 ⁶ See *Andrews I*, 398 F.3d at 1120.

21 ⁷ See *Andrews I*, 398 F.3d at 1121 (“[Section] 1915(g) should be used to deny a prisoner’s IFP
 22 status only when, after careful evaluation of the order dismissing an action, and other relevant
 23 information, the district court determines that the action was dismissed because it was frivolous,
 malicious or failed to state a claim.”).

24 ⁸ See *id.* at 1123 n.12.

25 ⁹ *Andrews II*, 493 F.3d at 1053.

26 ¹⁰ *Id.* at 1055.

27 ¹¹ *Id.*

1 imminence prong, the prisoner must allege that the danger is ongoing.¹²

2 Here, Hunter makes no plausible allegation that he faced an imminent danger of serious
3 physical injury at the time he filed his complaint. As the court noted in its previous order, in
4 Hunter's first pleading, entitled memorandum of points and authorities, Hunter's claims stem
5 from an arrest of Hunter on January 2, 2014. He alleged that Defendants Mark and Raymo were
6 using Hunter's state history CDC file "to abstract archives to utilize for a defense of pending
7 lawsuits in Santa Rosa." In several other pleadings filed within weeks of Hunter's
8 commencement of this action, Hunter appears to argue that defendants and others engaged in
9 false arrest and imprisonment, excessive force, fraudulent sex reports, and retaliation. It cannot
10 be said that these allegations of specific instances of retaliation, excessive force, and false arrest
11 placed Hunter under imminent danger of serious physical injury at the time of filing. At the very
12 least, Hunter has not suggested that he was at risk of an ongoing serious physical injury at the
13 time he initiated this action.

14 II. CONCLUSION

15 Hunter's motion to proceed in forma pauperis is DENIED. This action is DISMISSED
16 without prejudice to Hunter's refiling his claims in a new case in which Hunter pays the filing
17 fee. The Clerk shall terminate all pending motions and close the file.

18 IT IS SO ORDERED.

19 DATED: 8.28.14

Paul S. Grewal
20 PAUL S. GREWAL
United States Magistrate Judge

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26 ¹² See *id.* at 1056-57 (prisoner who alleges that prison officials continue with practice that has
27 injured him satisfies ongoing danger standard and meets imminence prong of three-strike
28 exception).

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